

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of Mid-Rivers Telephone)	WC Docket No. 02-78
Cooperative, Inc. for Order Declaring it to)	
Be an incumbent Local Exchange)	
Carrier in Terry, Montana pursuant to)	
47 U.S.C. §251(h)(2))	

**COMMENTS OF THE
MONTANA PUBLIC SERVICE COMMISSION**

I. Introduction and Background

The Montana Public Service Commission (MPSC) requests the Federal Communications Commission (FCC) issue an order declaring Mid-Rivers Telephone Cooperative, Inc. (Mid-Rivers) be treated as an incumbent local exchange carrier in the Terry, Montana exchange pursuant to 47 U.S.C. §251(h)(2).¹ Mid-Rivers has overbuilt Qwest's facilities in the Terry exchange and now provides service to over 85 percent of the customers. Mid-Rivers' investment in rural Montana and provision of advanced telecommunications services to the most rural customers in the country is precisely what the 1996 Telecommunications Act envisioned, and the FCC should immediately grant Mid-Rivers' petition to be designated an incumbent ILEC in this exchange.

Prior to 1996, Montana did not have a statute providing for licensing, franchising or certifying of telephone companies granting exclusive rights to serve certain areas. However, telephone cooperatives were prohibited from duplicating "reasonably adequate service," requiring cooperatives to make a showing that service in an area was inadequate

¹ 47 CFR 51.223(b).

before competing in that area.² Mid-Rivers was consequently prohibited from competing in the Terry exchange prior to 1996 absent a showing that Qwest's service was not adequate. After passage of the 1996 Act, Mid-Rivers moved into the Terry exchange and within one year captured over 85% of Qwest's customers.

II. Mid-Rivers petition satisfies the first two prongs of 47 U.S.C. §251(h)(2)

Mid-Rivers occupies a dominant position in the Terry exchange and has since 1997. Mid-Rivers' provision of service to over 85 percent of the customers in the area satisfies the requirements of 47 U.S.C. §251(h)(2)(A) and (B). Qwest now serves about fifteen percent of the customers, or about 75 customers total, in the Terry exchange. Unquestionably, Qwest has been substantially replaced by Mid-Rivers in that area.

With regard to the Commission's inquiry as to the definition of "area" pursuant to §251(h)(2)(A), area should be defined as the area for which the petitioner seeks incumbency. In this case, Mid-Rivers seeks to be designated an ILEC in the Terry exchange, and for purposes of its petition the Terry exchange should be the relevant area. A competitive LEC seeking to be treated as an incumbent under 251(h) should not be required to demonstrate that it meets the criteria of Section 251(h)(2) for any part of the legacy incumbent LEC's service area that is outside the scope of the petition. The competitive carrier seeking incumbency status should be required to demonstrate that the criteria of 251(h) are met for the area in which the petitioner seeks incumbency.

To interpret "area" any other way, as, for example, the Commission suggests, by requiring a competitive LEC to show that it meets the statutory criteria for a significant section of the legacy incumbent's service area, would be absurd. Mid-Rivers serves a

² Section 35-18-105(2), MCA; *Intermountain Telephone and Power Company v. Department of Public Service Regulation*, 201 Mont. 74, 651 P.2d 1015 (Mont. 1982).

very small portion of Qwest's entire service area, and the Commission's suggested definition would imply that Mid-Rivers could never qualify for incumbency status in Terry, Montana, in spite of the fact that it serves close to 100 percent of the customers in that exchange. It doesn't make sense that 47 U.S.C. §251(h)(2) was included in the Act only to be completely out of reach for small carriers serving the most rural areas of America that are facilities based competitors of the legacy incumbent carrier.

Mid-Rivers seeks incumbency status in the Terry exchange. The Terry exchange is therefore the controlling area for purposes of determining whether the competitive LEC has met the statutory requirements of 251(h). The FCC should adopt its tentative conclusions that Mid-Rivers has satisfied §251(h)(2)(A) and (B) and declare Mid-Rivers an ILEC in the Terry exchange.

III. Mid-Rivers petition is in the public interest

A. Mid-Rivers' network in Terry is superior to Qwest's network

Mid-Rivers offers advanced services in the Terry exchange, providing DSL, cable and dial up internet as well as Voicemail, Caller ID, and a full line of Custom Calling and CLASS features and ITV facilities to the Terry school.

In Terry, Mid-Rivers has over 100 customers who take dial up internet, about 50 customers who take high speed DSL, and over 250 customers who subscribe to Mid-Rivers cable service. Mid-Rivers' customers in Terry are able to access speeds of 768Kb downstream and 254Kb upstream.

In addition to its network, Mid-Rivers provides high level service quality to its customers. Mid-Rivers employs an installer/repairperson who lives in Terry and a customer services representative who makes monthly visits to the Terry exchange. Terry

customers have access on a 24 hour, 7 days per week throughout the year basis to the Mid-Rivers Technical Assistance Center in Glendive, Montana.

The investment Mid-Rivers has made in its network in Montana satisfied the public interest criteria of Section 251(h)(2)(C) of the Act, and Mid-Rivers should be declared an incumbent in the Terry exchange.

B. Universal Service Concerns

Many of the Commission's concerns about granting Mid-Rivers' petition center around the subsequent regulatory treatment of Qwest and the attendant impacts on the universal service fund should both Mid-Rivers and Qwest receive increased support by virtue of Mid-Rivers' ILEC status. The regulatory classification of Qwest should not deter the FCC from granting Mid-Rivers ILEC status.

Classifying Mid-Rivers as an ILEC in the Terry exchange will not have an automatic impact on the universal service fund. Assuming Mid-Rivers will apply for a waiver of the frozen study area rules once it is granted ILEC status,³ the impact on the universal service fund would not be significant enough to support an FCC determination to reject Mid-Rivers' petition. Mid-Rivers projected first quarter 2005 ILEC monthly support is \$49.16 per line.⁴ Mid-Rivers projected first quarter 2005 monthly support as a rural CLEC in the Terry exchange is \$44.56 per line, the same as Qwest's support.⁵ Mid-Rivers currently has less than 500 lines in Terry. Taking the difference of what Mid-Rivers currently receives in Terry and what it will get if designated an ILEC and multiplying by 500 lines, the annual impact on the fund if Mid-Rivers is designated an

³ Mid-Rivers has indicated it will petition for such a waiver once the petition is granted. Mid-Rivers Petition, page 3.

⁴ See Universal Service Administrative Company (USAC) HC01 p.17, HC05, p. 15 (Mid-Rivers High cost monthly loop support at \$543,810/11,062 working loops.)

⁵ USAC HC14, p. 42.

ILEC would be less than \$28,000 as compared to the annual universal service fund revenues of approximately 3.9 billion dollars.⁶

While the potential impact on the universal service fund is a consideration, it must be balanced with the public interest concern of encouraging investment and network building in rural areas. In this case, Mid-Rivers' investment warrants the increased support that it might get should it successfully petition for a waiver of the study area rules.⁷

Mid-Rivers petition to be an ILEC should be weighed on the merits of what Mid-Rivers has accomplished in the area for which it seeks ILEC status. Mid-Rivers has invested in this area, building out a network in a rural area where Qwest was not investing. Mid-Rivers has met the criteria of Section 251(h)(2) and it is in the public interest to declare Mid-Rivers an ILEC in the Terry exchange. Mid-Rivers has provided direct, facilities based competition along with high quality local service and presence to achieve an 85% share of the market from the incumbent Qwest. It is difficult to imagine a more favorable outcome for customers.

The Commission's concerns seem to imply that carriers in rural areas should not overbuild the incumbent, qualify for ILEC status under 251(h) and thereby potentially access increased universal service funds. The Commission seems to suggest that because of universal service fund concerns, rural carriers should remain dependent on the costs of

⁶ In actuality, the status quo may deplete the universal service fund at a greater rate than would happen if Mid-Rivers and Qwest change positions. Because the distribution mechanism is based on statewide average costs of all non-rural companies, Qwest's loss of lines in the Terry exchange makes it appear more rural statewide, which increases its funding. Removing the Terry exchange from Qwest's study area would most likely decrease the total fund size with respect to Qwest.

⁷ See generally the Montana Commission's Reply Comments in CC Docket No. 96-45, *In the Matter of the Federal-State Joint Board on Universal Service Request for Comments on Certain of the Commission's Rules Relating to High-cost Universal Service Support*.

the legacy incumbent carrier, rather than pursuing facilities based competition in rural America. The Commission's implied approach creates no incentive for carriers to build and invest in rural areas. That approach is not in the public interest.

The Commission suggests that because support would be frozen at the incumbent's status if Mid-Rivers were to purchase Qwest's exchanges, that result might be appropriate here, where rather than purchasing the exchange, Mid-Rivers overbuilt the exchange. That result would deter investment and have a chilling effect on facilities based competition from rural carriers in rural areas. Mid-Rivers overbuilt Qwest's facilities because Qwest would not sell its facilities to Mid-Rivers, but at the same time Qwest did nothing to invest in its network in this area. In order to serve the Terry exchange, Mid-Rivers built a network capable of deploying advanced services.

The public interest would not be served by applying the transfer and sale of exchanges limitation in CFR 54.305 to a carrier that overbuilds a legacy incumbent. Not only does the limitation of 54.305 not apply here, it should not be triggered and applied if Mid-Rivers does buy any of Qwest's remaining facilities. Otherwise Mid-Rivers could be dissuaded from purchasing any of Qwest's remaining facilities and with no other potential purchaser, Qwest would be left with un-necessary stranded costs.

Public interest issues involving the universal service fund are critical and should be addressed. However, this docket is not the appropriate forum for that inquiry. Mid-Rivers' petition to be declared an ILEC should be evaluated on the criteria set forth in 251(h). Public interest concerns should balance the incentive a rural carrier has to invest in rural areas with potential impact on the universal service fund. The Act contemplates carriers like Mid-Rivers becoming ILECs in extremely rural areas like Terry, Montana.

The incentive a carrier has to invest in an area like Terry is partly based on potential increased universal service funds that might be available to a carrier once it gains ILEC status under 251(h). The Commission should not remove that incentive by denying Mid-Rivers ILEC status or by artificially limiting the support to Qwest's costs. The case presented by this application must be based upon the factual circumstances and public interest showing at issue in this case. The Montana PSC respectfully urges that the Commission accept the analysis presented here and approve Mid-Rivers ILEC application. Policy issues surrounding the size of the universal service fund should be addressed separately.

C. Access charge considerations

The Commission expresses concern about increased access charges as a result of Mid-Rivers becoming an ILEC in Terry. This concern is based on the same premise as the concern regarding universal service. Mid-Rivers has invested in a network and become a facilities based competitor, and should be allowed as a rural ILEC to charge access rates at the NECA tariffed rate.

The purpose of access charge rates in NECA tariffs is to compensate carriers serving customers in certain areas. Here, as with universal service fund concerns, public policy concerns relating to access charge rates should be addressed independently from the issues raised in this proceeding. Mid-Rivers has, as a matter of fact, become the principle telecommunications provider in Terry based on its service quality, technology and investment. Mid-Rivers' status should be recognized as a matter of law, and Mid-Rivers should be allowed to avail itself of the privileges available to the carrier serving a majority of customers in a given area.

The fact that Mid-Rivers will be entitled to charge access rates higher than what it now charges does not mean that it is not in the public interest to grant Mid-Rivers ILEC status, but rather means that Mid-Rivers is not currently receiving the funds for which it qualifies. It is contrary to the public interest to confine Mid-Rivers to its current access charges when it has met the criteria of 251(h) and should be allowed to avail itself of the rates available to rural ILECs.

D. Subsequent Regulatory Treatment of Qwest

Qwest is the legacy incumbent carrier in the Terry exchange. Qwest should retain its status as an incumbent carrier, and should remain subject to the unbundling obligations of Section 251, the carrier of last resort obligations of Section 214, and Qwest's high cost support calculation method should not be a function of Mid-Rivers' classification as an ILEC. Section 251(h) states that the Commission may declare a local exchange carrier an incumbent for "purposes of this section." Qwest therefore can be an ILEC for purposes of 251, and receive universal service support on a basis other than that used to calculate support that Mid-Rivers would receive as an ILEC.

Mid-Rivers and Qwest are not dependent on one another in terms of how they are classified in the Terry exchange. There is nothing in the Act that precludes two ILECs from operating in one exchange at the same time. The Act contemplates a situation where there might be two co-existing ILECs, and 251(h) provides a basis for treating two ILECs differently based on the carrier's status as a legacy incumbent ILEC under 251(h)(1) or as a new ILEC designated under 251(h)(2).

Qwest should not be reclassified as a competitive local exchange carrier in the Terry exchange. Where there are two ILECs in an area, it is consistent with the separate

qualification mechanisms of 251(h) to subject the two ILECs to different regulatory treatment. The presence of a legacy ILEC in an exchange should not change a rural carrier's protections afforded by Section 251(f). Similarly, a legacy ILEC does not lose its region wide market dominance that requires certain treatment under the Act, and the obligations of a legacy ILEC should not be removed because a second ILEC is present in a certain area.

Qwest's regulatory status is totally independent of Mid-Rivers' petition. The Commission should not delay action on Mid-Rivers' petition in order to ascertain the proper treatment of Qwest. There is no automatic reclassification requirement for Qwest that is triggered if Mid-Rivers is declared an ILEC in the Terry exchange.

The MPSC urges the Commission to grant Mid-Rivers petition without further delay. If Qwest's status must be clarified prior to acting on Mid-Rivers' petition, the Commission should declare that there are two co-existing ILECs in the Terry exchange, each of which has different characteristics and obligations, and each of which draws support based on different calculation methodologies.

E. Forbearance

The FCC should not forbear from applying the Act's regulatory requirements to Qwest in the Terry exchange once Mid-Rivers petition is granted. It is not clear if the FCC would forbear from applying all or some of the requirements of the Act to Qwest and whether such forbearance would be limited to the Terry exchange.

The Commission must determine that the criteria in 47 U.S.C. §160(a) are satisfied prior to forbearing from further regulation of Qwest. Some potential public interests that might arise if the Commission forbears from addressing Qwest's status in

the Terry exchange are the application of the state commission's enforcement authority under §160(e) if the Commission forbears from applying the Act to Qwest. Qwest may still apply to the state commission to relinquish its ETC status in the Terry exchange, and it is unclear where that application would be resolved if the Commission applies its forbearance authority to Qwest.

In addition, Montana does not have a state carrier of last resort statute, so if the FCC forbears from applying the Act to Qwest, it is not clear whether Qwest would retain its current ETC status without being obligated to function as a carrier of last resort pursuant to §214.

Further, Qwest should not be reclassified as a competitive LEC in the Terry exchange. In Montana, a relaxed regulatory structure has been put in place that governs competitive LECs; Qwest, however, remains a fully regulated LEC.⁸ If Qwest were classified by the Commission as a CLEC in the Terry exchange, and if the Commission then forbears from applying the regulatory requirements of the Act to Qwest, there would be implications in Montana that might result in inconsistent treatment. The Commission should avoid this result. Reclassification of Qwest is not a necessity. Because certain Commission rules are predicated on one ILEC in certain areas, and because no case of two co-existing ILECs has been presented to date, it does not follow that two ILECs can't exist in one area and receive different regulatory treatment. Qwest should retain its status as a legacy ILEC in Terry and it should retain all of its obligations as a legacy ILEC.

⁸ See discussion of regulatory treatment of competitive carriers in Montana at pages 24 – 27 of Order No. 6479d in PSC Docket No. D2002.12.153, Final Order issued February 12, 2004.

F. Process for future applications

The language of Section 251(h) implies that the Commission is not limited to granting applications filed under Section 251(h) by rule. The Commission should gather data on the kinds of petitions it receives under 251(h) for a limited period of time and then decide whether rules are necessary, or whether handling such petitions on a case by case basis is more appropriate.

251(h) petitions will necessarily be fact driven, and a rulemaking may not be the most appropriate mechanism for handling such petitions. However, depending on the number of petitions that are filed and the commonalities of such petitions, a rulemaking may be appropriate. Rules might be appropriate to set general guidelines, such as establishing a certain class of carriers that could qualify for ILEC status under 251(h)(2); such as overbuild carriers, like Mid-Rivers.

If, over the course of the next year, more petitions are filed, the FCC may have enough information to proceed to a rulemaking. If however, only a limited number of petitions are filed, then case by case orders may be the most efficient process for deciding such petitions. In any event, the FCC should act expeditiously on such petitions.

III. Other Considerations

Mid-Rivers should be designated an ILEC in the Terry exchange, but as a rural ILEC it should retain the protections afforded by rural carriers by Section 251(f). Once Mid-Rivers is designated an ILEC by the FCC, the state commission could, under certain circumstances, terminate the exemption if appropriate. 47 CFR 51.223(a). If Mid-Rivers is not designated an ILEC in Terry, then the state commission may not impose the obligations of 251(c) on Mid-Rivers. 47 CFR 51.223(a). Because Mid-Rivers serves

over 85 percent of the customers in Terry, it is in the public interest to grant Mid-Rivers ILEC status and therefore, potentially and when appropriate, open its network to competitors. Without such designation, the carrier serving nearly every customer in Terry, Montana is not obligated to make its network available to competitors.

Finally, both Mid-Rivers and Qwest should remain carriers of last resort pursuant to 47 U.S.C. §214 until such time as one of them might apply to the state commission for relinquishment of its ETC status.

IV. Conclusion

This is not a complicated matter. Mid-Rivers has done what the Act contemplated and has done it well. Mid-Rivers' petition should be granted based on the facts and the law. Potential issues regarding universal service support and access charge rates can be addressed in the requisite subsequent study area waiver proceeding.

Policy concerns raised by the Commission should be addressed separately from this proceeding. Mid-Rivers' petition for relief should not be stalled while those policy issues are resolved.

The MPSC urges the FCC to declare Mid-Rivers an ILEC in the Terry, Montana exchange without further delay.

Respectfully submitted this 21st day of December, 2004.

THE MONTANA PUBLIC SERVICE COMMISSION

BOB ROWE, Chairman
THOMAS J. SCHNEIDER, Vice Chairman
MATT BRAINARD, Commissioner
GREG JERGESON, Commissioner
JAY STOVALL, Commissioner